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From a Defense Attorney's Perspective: "There is No Free Lunch"

Michael Crofton

FROM A DEFENSE ATTORNEY'S PERSPECTIVE: "THERE IS NO FREE LUNCH"

Hon. George C. Pratt:

Our next section will include attorney Michael Crofton, followed by Professor Oscar Gray.

*Michael Crofton, Esq.**:

Thank you very much. Let me state from the outset that I am an attorney in practice. I am not an academic, unlike many of the learned people here today. I am essentially a trial lawyer, which means that I spend a lot of my time in court in front of juries or talking to my clients about problems that face them. My clients are generally defendants in products liability cases. They include insurance companies and manufacturers. When I say manufacturers, I do not only mean major manufacturers. Although these certainly are some of our clients, we also represent smaller businesses that manufacture products which lead to litigation. So from that point of view, I think you should understand that what I say comes from a defense perspective, as quite obviously others here today may speak more from a plaintiff's perspective.

I came to this country seven years ago and I understood it to be the land of opportunity.[1] But attached to the land of opportunity is a very important caveat which I think Mr. Vargo, who spoke earlier,[2] and indeed many plaintiffs' lawyers, and unfortunately plaintiffs themselves, seem to forget. There are other important

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1. Mr. Crofton is originally from Durban, South Africa.

2. *See* John F. Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in The Restatement (Third) for Products Liability?*, 10 TOURO L. REV. 21 (1993).

phrases in the American culture: "There is no free lunch,"[3] and "You get what you pay for."[4]

Law is a political exercise. A society determines the level to which it will inoculate its people against harm. The law is the vehicle through which those decisions are made. So if we, in the United States, believe that people should recover for their injuries under any circumstance, that is fine; and may I say that is fine with my clients too. I represent insurance companies and manufacturers, and provided that, in advance of the harm occurring, society has made the determination that everyone will recover for an unknowable or undiscoverable risk which subsequently causes harm, manufacturers can price their products accordingly. In addition, through actuarial means, insurers can evaluate that risk in advance. The price of that assessment, and the societal cost of the decision to protect citizens, will be built into the product and the insurance prospectively. In other words, in applying this approach, every product sold from today going forward would have an element of cost within it which will reflect the decision of society.

However, where fairness deserts us, and what I think Mr. Vargo seems to forget, is that in many circumstances, products which were put on the market years ago, and the insurance policies to cover them, made no allowance, nor could they, for expansions in liability and coverage which modern courts and lawyers seem to favor.[5] Therefore, you have situations arising today

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3. The proverb implies that you cannot get something for nothing. Theories as to the origin of this quote range from a colloquial axiom in United States economics now in general use, to an Italian immigrant with a shoe-shine box outside Grand Central Station in New York City. *See* SIMON JAMES & ROBERT PARKER, A DICTIONARY OF BUSINESS QUOTATIONS 51 (1991); J.A. SIMPSON, THE CONCISE OXFORD DICTIONARY OF PROVERBS 87 (1982).

4. This quotation is attributed to Gabriel Biel and can be found in Expositio Canonis Missae, lectio. *See* JOHN BARTLETT, FAMILIAR QUOTATIONS 150 (15th ed. 1980).

5. *See* TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 54 (1987) ("The recent expansion of tort liability doctrines has been one of the most dramatic and far-reaching developments in modern American law . . . . The most active and visible area of expanding tort liability has been that of product liability."); Mark M. Hager, *Civil Compensation and its*

where, for example, asbestos manufacturers have gone out of business or have been declared bankrupt.[6] Similarly, insurance companies have gone out of business or have been bankrupted. Lloyd's of London,[7] for example, has been severely threatened by the problem of the unknowable risk,[8] and has been severely

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Discontents: A Response to Huber, 42 STAN. L. REV. 539, 572 (1989) (reviewing PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988)) ("Modern tort law has attempted to make life safer by an expanded imposition of liability on the pursuers of harm-causing activities and the makers of harm-causing things."); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1525 (1987) ("The expansion of liability since the mid-1960's has been chiefly motivated by concern of our courts to provide insurance to victims who have suffered personal injury.").

6. *See* Robert Rice, *Reinsurers Reeling from Red-Line Entries*, FIN. TIMES, Oct. 15, 1993, at 6 ("Giant U.S. corporations such as John Manville [sic], the asbestos manufacturer, and A.H. Robins, the pharmaceutical group, had been forced into Chapter 11 protection and insurers and reinsurers around the world were 'reeling from red-line entries.'"); *see, e.g.*, *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992) (class action beneficiaries seeking revision of obligations and payment procedures under trust created pursuant to the confirmed Chapter 11 bankruptcy plan filed by the Johns-Manville Corporation, the world's largest manufacturer of asbestos); Willis v. Celotex Co., 978 F.2d 146, 147 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993) (concluding that stay of proceedings against third-party sureties to enforce payment on bonds by the bankruptcy court was proper based on the facts of Celotex Corporation's Chapter 11 bankruptcy under 11 U.S.C.A. § 105(a)); UNR Indus., Inc. v. Continental Casualty Co., 942 F.2d 1101, 1103 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1586 (1992) (reversing dismissal of UNR claims against two insurers based on District Court's failure to take adequate account of asbestos manufacturer UNR's bankruptcy reorganization).

7. *See* Eugene Robinson, *At Lloyd's, Disaster Hits Home: London Insurer Undertakes Reforms in Wake of Losses*, WASH. POST, Oct. 8, 1992, at B10. Lloyd's of London is an insurance institution where approximately 1,300 investors join one of hundreds of investor syndicates, which make individual decisions as to whether to insure all or part of a certain risk. Each investor then shares in the profits and losses of their individual syndicate. Individual liability for the losses incurred by an investor's syndicate is unlimited. *Id.*; *see also* RAYMOND FLOWER & MICHAEL WYNN JONES, LLOYD'S OF LONDON: AN ILLUSTRATED HISTORY (1974).

8. *See* G. Bruce Knecht, *Beleaguered Lloyd's: Famed British Insurer is Fighting for Survival*, BARRONS, June 1, 1992, at 15 ("[U]nlimited liability--

penalized because society, particularly American society, has shifted the goal posts during the game. Now, burdens of liability and coverage are imposed long after the price of the product and the insurance was agreed and paid.

So this is where fairness comes in. Should manufacturers and insurers be required to provide American society with a "free lunch?" It is easy to present a sympathetic case about an individual consumer, and of course there are often tragic situations where individual consumers are harmed and may not recover compensation. However, if Americans feel strongly about these cases, we as a society have got an obvious solution. We can step forward and say, "We will take care of that person, today, as taxpayers."[9] Plaintiffs' lawyers like Mr. Vargo, and indeed

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historically one of the organization's chief attractions for clients--probably will become a relic of the past."); John Moore, *Posgate Calls for End to Lloyd's Principle of Unlimited Liability*, INDEPENDENT, Sept. 24, 1991, at 22 ("Lloyd's and its underwriting members have been hit by more than one billion pounds of losses and an internal task force is considering whether unlimited liability is an appropriate mechanism to underpin Lloyd's insurance policies."); Robinson, *supra* note 7, at B10 ("Multibillion-dollar losses--$4 billion worth of red ink in 1989 alone--have spurred rebellion among investors and forced the embattled Lloyd's management team to cobble together a program of reforms.").

In the wake of $9 billion in losses over the last three years, Lloyd's recently announced that its members have approved a proposal which permits "institutions, other insurers and corporations to invest for the first time in underwriting policies . . . ." Richard W. Stevenson, *Losses Force Lloyd's into New Funding*, N.Y. TIMES, Oct. 21, 1993, at D1. Until now, Lloyd's capital had been solely supplied by individual investors. *Id.*

9. Some commentators have suggested that there are three ways that a society can offset the cost of tort recovery: through individual insurance purchased by "potential victims (or their employers)"; through a form of "social welfare" by government taxation; or by requiring manufacturers to absorb the loss themselves, which eventually passes the loss on to the consumer. *See* David G. Owen, *Moral Foundations of Products Liability*, 68 NOTRE DAME L. REV. 427, 487 (1992); *see generally* Gary T. Schwartz, *The Ethics and The Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 313-14 (1990) (discussing the use of liability insurance to compensate tort victims and its relationship to the "fairness and deterrence objectives" of tort law); Robert Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 558 (1985). Sugarman proposes the following reforms for the current tort compensation system:

plaintiffs themselves, say that we should not ask that price to be paid by all the citizens of the United States. Instead, they want to place the cost only on certain individuals or taxpayers, such as manufacturers and insurance companies.[10]

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(1) eliminate tort remedies for accidental injuries; (2) build on existing social insurance and employee benefit plans to assure compensation to accident victims in line with compensation provided for other major causes of income loss and medical expense; and (3) build on existing regulatory schemes both to promote accident avoidance and to provide outlets for complaints about unreasonably dangerous conduct.

Id. Courts have also urged change in the current law of product liability, *see, e.g.*, Nichols v. Union Underwear Co., 602 S.W.2d 429, 432 n.1 (Ky. 1980):

It seems to us that the entire field of product liability law is especially fertile for comprehensive legislative review and action. Its rows need to be stably defined by legislative survey of the socioeconomic policies which determine its contours. Additionally, uniformity of law among all the states may be desirable because product liability insurance rates are set on a countrywide basis. Thus, the current system of having individual state courts develop product liability law on a case-to-case basis is not consistent with commercial necessity. Uniformity and stability in this area are desirable if product liability insurance rates are to be stabilized at reasonable levels.

Id.

10. *See* Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897, 940 (1988) (stating that manufacturers are "appropriate loss-spreaders" and losses incurred by consumers injured by defective products should be absorbed by manufacturers who benefit from the presence of the product in the market); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J. L. & COM. 167, 175 (1989) (noting that the theory of strict liability itself presumes that "the corporations making and selling a product are in the best position to insure against the risk of injury from the product"); Diane B. Lawrence, *Strict Liability, Computer Software and Medicine: Public Policy at the Crossroads*, 23 TORT & INS. L.J. 1, 11 (1987):

Courts impose strict liability in defective product transactions for the following reasons: 1) the manufacturer, due to his superior knowledge, is in the best position to prevent, discover, and eliminate defects, thus he should pay for damages inflicted by a defective product; 2) the manufacturer places the product in the stream of commerce and the consumer relies on the skill, care, and reputation of the manufacturer that the product is safe to use; 3) the manufacturer is in a better position than the consumer to absorb and spread the risk or cost of injuries

These are the political and economic realities, and I think we should not forget them. I would not mind, as a representative of insurers or manufacturers, if we had a strict liability standard for design defect[11] or failure to warn.[12] That is fine. But let us do it prospectively, so that every product that goes out the door from today can be evaluated on that basis. The consumer will ultimately pay for protecting against those risks. Mr. Vargo raised the question of shifting the risk, and said we were only looking at half the problem because, while the manufacturer may pay in some circumstances, the individual consumer may have to bear the cost in other circumstances.[13] But what is wrong with that? Economic reality is that ultimately, the consumer always pays.

> through insurance or increased prices; and 4) the consumer should not be prevented from recovery due to the burdensome requirements of tracing a particular item through the distribution and production systems to the source of the defect.

Id.; Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Product Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1215 (1992) ("If the manufacturer is not liable, the cost will fall on the injured consumer. Surely this is more inequitable than placing the cost on the party responsible for putting the product on the market.").

11. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 698-99 (5th ed. 1984). A product is defective in design when it is "unreasonably dangerous in relation to design hazards." *Id.* at 698. Two different tests are utilized in determining design hazards. The first is the consumer-contemplation test. Under this test, a product is dangerously defective if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics." *Id.* Under the second test, risk-utility, a product is dangerously defective if "the magnitude of the danger outweighs the utility of the product." *Id.* at 699. This is based on the idea that all products have both benefits and risks, and the only way to evaluate the design danger is to weigh the danger against the utility. *Id.*

12. *Id.* at 685.

> A manufacturer or other seller is subject to liability for failing either to warn or adequately to warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells.

Id. The hope is that adequate warnings on products will reduce risk and protect "individual autonomy in decision-making." *Id.*

13. *See* Vargo, *supra* note 2, at 32-33.

That is not unfair. That is the way the society works. We all pay taxes.

During the last presidential election, Bill Clinton went forward on the slogan, "It's the economy, stupid."[14] When people in his campaign started talking about other issues, such as social issues of less concern to the person in the street or to the average taxpayer or voter, his campaign workers were forced to come back to the essential issue, "It's the economy, stupid." But what was the problem? The problem was that America had for many years gone forward without paying the bill.[15] It had been borrowing against the future.[16] This is analogous to what Mr. Vargo may be trying to suggest be done today. However, if we are going to pay the bill for increased liability provisions in favor of consumers, we should start paying for them starting today. If we expand the right of a plaintiff to recover, we, as consumers, not just as manufacturers, should start paying the bill from here on in. Obviously, expanded rights of recovery in tort cost something.[17]

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14. *See* David S. Broder, *Clinton's Wobbly Base*, WASH. POST, Aug. 22, 1993, at C7. This quote is attributed to President Clinton's top campaign consultant, James Carville.

15. *See* Donald L. Barlett & James B. Steele, *The End of the American Dream*, ST. PETERSBURG TIMES, Apr. 5, 1992, at 1D; Sam Hodges, *Debt Dwarfs Deficit*, PLAIN DEALER, Feb. 21, 1993, at 1C. As of Monday, September 30, 1992, the United States government had operated on a deficit for the 23rd consecutive year. This is the longest period in United States history. The previous record of 16 years consecutively ran from 1931 to 1946, the years encompassing the Great Depression and World War II.

16. *See* DAILY LAB. REP. (BNA), No. 164, at D-11 (Aug. 26, 1993). Current estimates for the deficit include a $285 billion forecast for 1993 and a $300 billion forecast for 1994.

17. *See* Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 9 (1991) (noting one side effect of expanded tort recovery is increased manufacturer investment in making products safer, which drives up the cost of prices to the consumer); George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REG. 237, 239 (1992) ("[I]n recent years the expansion of tort liability has made it unprofitable to produce or offer various types of manufacturing equipment, consumer goods and consumer services, all of which, as a consequence, have been withdrawn from markets."); Owen, *supra* note 9, at 286 n.255 (noting that requiring manufacturers to absorb the cost of tort liability eventually passes the burden

"There is no free lunch." Regrettably, this is too often forgotten or simply hidden from the public by a strategy of adversarial consumerism, with "we" being the "little guy" consumer, and "they" being the heartless manufacturers and insurance companies.

I would like to move on to another two aspects of today's discussion which affect us as defense lawyers. I am delighted that an attempt is being made to reform section 402A.[18] As to the precise form the revision is going to take, I was somewhat disturbed to read the *Cornell Law Review* article[19] because I felt that it had tracked the approach taken in the original section 402A.[20] This approach was to have a very short black letter section followed by numerous comments.[21] What, in effect, happened over the next couple of decades was that courts took the

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on to the consumer "[i]n the form of higher prices and diminished availability of the product").

18. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides in pertinent part:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
>
> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

19. *See* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

20. *See supra* note 18.

21. *See* Henderson & Twerski, *supra* note 19, at 1514-26 (outlining the proposed revision and accompanying comments).

numerous comments and turned them into black letter law.[22] However, if you go back to 402A and read it in its original context and according to its original intention, I think the comments were intended to do no more than elucidate a principle. They were not intended to be black letter law.[23] To my delight, in talking to Professor Henderson, he told me the approach to be taken with the latest revision is to spell out in more detail the "black letter law" and to break it out into many more sections than was previously the case. From a defense

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22. *See* Myron J. Bromberg, *The Mischief of the Strict Liability Label in the Law of Warnings*, 17 SETON HALL L. REV. 526, 527 (1987) ("The comments are accepted as so integral to the black letter rule of § 402A that they are commonly treated as part of that rule."); *see, e.g.*, Hartman v. Miller Hydro Co., 499 F.2d 191, 194 (10th Cir. 1974) (relying on Restatement (Second) of Torts § 402A comment i to conclude that an assistant production manager of safety had sufficient knowledge and should have realized that an exposed revolving shaft was dangerous); Brown v. Abbot Lab., 751 P.2d 470, 477 (Cal. 1988) (interpreting Restatement (Second) of Torts § 402A comment k to be applicable to evaluating a drug manufacturers' liability for all prescription drugs); Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 387-88 (Tex. 1991) (relying on Restatement (Second) of Torts § 402A comments i and j to conclude Seagrams had no duty to warn that excessive consumption of alcoholic beverages caused alcoholism because such information was common knowledge); Grundberg v. Upjohn Co., 813 P.2d 89, 95 (Utah 1991) (relying on Restatement (Second) of Torts § 402A comment k to exempt from strict liability manufacturers of drugs which are unavoidably dangerous); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 798-99 (Wis. 1975) (citing Restatement (Second) of Torts § 402A comment i to conclude that the absence of self-latching gate to a swimming pool was so obvious that it precluded finding swimming pool manufacturer liable).

23. *See* Joseph A. Page, *Generic Product Risks: The Case Against Comment k and for Strict Liability*, 58 N.Y.U. L. REV. 853, 857 (1983) ("[S]ection 402A of the Restatement and its comments provide little guidance in deciding cases that involve generic risks and should not be accorded dispositive weight in product liability suits."). Many courts have refused to treat the comments as black letter law; *see, e.g.*, Riley v. American Honda Motor Co., 856 P.2d 196, 200 (Mont. 1993) ("Our adoption of Restatement (Second) of Torts [section] 402A was not a wholesale adoption of the comments accompanying that provision . . . ."); Collins v. Eli Lilly Co., 342 N.W.2d 37, 52 (Wis.) ("Although we adopted [section] 402A . . . we specifically declined to accept or reject any of the comments."), *cert. denied sub nom.*, E.R. Squibb & Sons, Inc. v. Collins, 469 U.S. 826 (1984).

standpoint, I think this is going to be a tremendously useful thing. The reason is that, and I come back to what I said before, as defendants in these lawsuits, insurers are not averse to risk. If you ask an insurer or underwriter, "Do you like risk or do you not like risk?" he will not really take a view. He will say, "Tell me the risk and I will price it. The more risk, the more money I will make." I know, for example, in the aviation industry, that as airlines have become safer over the years, premiums have plummeted.[24] This is bad for the insurance market.[25] Economically speaking, insurers might do better if planes were going down all the time so that airlines would pay more in premiums. In other words, insurance companies are not necessarily risk averse, they are surprise averse.[26] They do not want to be surprised in the year 2010 by a court's ruling which creates a risk, or interprets a policy to extend coverage,[27] that the insurer did not build into the premium today. That is a very sensible approach. Of course, interlocking with this are the interests of the

24. *See generally* David Warsh, *Fear of Flying Is Not Justified, New Study Says*, BOSTON GLOBE, Jan. 20, 1988, at 73 (suggesting that after deregulation of airlines in 1978, airline safety has improved, resulting in decreased premiums for liability and hull insurance).

25. *See generally* Dallas Morning News, *Airline Insurance Rates Take A Surprising Drop*, CHI. TRIB., May 29, 1988, at 10B (noting that as airline insurance premiums continue to drop, insurance companies are less profitable and approach "the break-even point").

26. *See generally* Richard C. Ausness, *Unavoidably Unsafe Products and Strict Liability: What Liability Rule Should be Applied to the Sellers of Pharmaceutical Products?*, 78 KY. L.J. 705, 761 (1990) ("insurers may be unwilling to insure against such liability arising out of undiscovered product risks"); James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 949 (1981) ("[O]ne problem with justifying liability for unknown hazards on notions of loss spreading is the assumption that defendants will be able to insure or to survive without insurance. It is doubtful that liability for unknown risks could adequately be insured against.").

27. *See* American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1510 (S.D.N.Y. 1983) ("The expanded notions of liability to which courts have pointed in construing [insurance] policy language are entirely the product of conceptions formulated and rulings made years after the language at issue had been promulgated."), *aff'd*, 748 F.2d 760 (2d Cir. 1984).

consumer in getting a safe product today, and we should not stop trying to advance safety and simply choose to rely on insurance to pay all the costs associated with all the injuries that come about. Some sort of balance needs to be struck.

When it comes to reformulating today, or in the next year or two, section 402A, as long as the language is precise, I, as a trial lawyer, would be delighted. I do not want to advise my client as to what the law is in March of 1993 and then three years down the road have a judge tell me, "Well, in fact, that is not the law, I have decided that the law is something else." We cannot settle cases that way. As a practicing lawyer you prefer to have precision. There is, of course, a price to be paid for precision, as Professor Twerski indicated.[28] However, when I canvassed a number of lawyers about today's seminar, including some far more prominent than myself in the area of products liability law, the approach they all suggested was basically the same: "Let us just make the law clear."

One of the reasons that lawyers would like to make the law clearer than it is, and more precise than it is, is that issues could then be decided more often by judges than juries. This is an anathema to Mr. Vargo. I know that he loves juries. However, I canvassed numerous attorneys in my office and in other offices, and I concede that none of them were plaintiffs' lawyers -- and I said, "Do you have any faith in a jury looking at complex questions of products liability law, and not only questions of law but factual questions, and coming to the right decision?" One-hundred percent of the lawyers in this completely unscientific survey said, "I have no faith in the jury doing that." I similarly have no faith in the ability of a jury to accurately and objectively assess the complex issues that come up in these cases.[29] I do not suggest for a moment that it is politically possible to do away with juries.

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28. Aaron D. Twerski, *From A Reporter: A Prospective Agenda*, 10 TOURO L. REV. 5, 19 (1993) (stating that lawyers may not like precision or clarity in this area of law, since it prevents them from legal maneuvering).

29. *See* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 AM. U. L. REV. 727 (1990) (addressing concerns about a jury's ability to comprehend complex civil litigation and proposing techniques to ameliorate those concerns).

However, what one can do is create law that is clear enough so that it gives judges the confidence to make decisions about facts that are not in dispute.

In warning cases,[30] I have been in situations where the injured party actually concedes, in a deposition, that he read and understood the warning and he nevertheless was injured by the very danger or mode of operation that the warning label warned him of. Yet on summary judgment, when one goes to the court and says "we must strike the claim based on failure to warn because this guy was properly warned," judges inevitably will pass the ball. When I say inevitably, that is maybe too strong. They will look for opportunities to pass the ball to the jury.[31] I would like to see judges decide more cases, and if they decide more cases on this basis in favor of the plaintiff, so be it. But what we do not like is to be forced to go to trial where facts essentially are not in dispute, but nevertheless the court tosses the ball to the jury.

As to what one can do about the jury system in the United States, I am not too sure. What I do know is that as presently practiced in some state jurisdictions,[32] and less so in the federal

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30. *See* KEETON ET AL., *supra* note 11, at 685.

31. *See, e.g.*, Deines v. Vermeer Mfg. Co., 755 F. Supp. 350, 353 (D. Kan. 1990) (denying defendant's motion for summary judgment even though it had placed warnings on its hay baler, stating that it is the role of the jury to evaluate whether the warnings displayed by the defendant were adequate); Rinehart v. International Playtex, Inc., 688 F. Supp. 475, 477 (S.D. Ind. 1988) (denying defendant's motion for summary judgment on the issue of adequacy of the warnings on defendant's tampon box and package insert because the determination of adequacy is a question of fact to be decided by the jury); Sanderson v. Upjohn Co., 578 F. Supp. 338, 340 (D. Mass. 1984) (denying Upjohn's motion for summary judgment even though the plaintiff's physicians were warned of the reported side-effects of the drug, stating that the general rule is that "adequacy of warning questions" are for the jury).

32. *See* Tracey L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 CHI.-KENT L. REV. 549, 555 (1992). While the majority of state courts do not allow attorney oral participation in the questioning of prospective jurors, many states do permit such participation; *see, e.g.*, DAVID D. SIEGEL, PRACTICE COMMENTARIES to N. Y. CIV. PRAC. L. & R. § 4107 (McKinney 1992) (stating that it is the practice of New York courts for attorneys to conduct the voir dire of prospective jurors).

courts,[33] jury selection is an exercise in what I call applied bigotry.[34] We take a view, we take a practical view, as to whether or not particular individuals before us would be sympathetic to a right of recovery for this plaintiff. This is the reality. This is

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33. FED. R. CIV. P. 47(a). Rule 47(a) provides:

> The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Id. However, the majority of federal judges conduct the voir dire without the oral participation of attorneys. *See* Rhonda McMillion, *Advocating Voir Dire Reform*, A.B.A. J., Nov. 1991, at 114 (stating that few federal judges permit lawyers to question prospective jurors directly); Treger, *supra* note 32, at 555; Otto G. Obermaier, *Judge Conducted Voir Dire*, *in* PRACTICING LAW INSTITUTE, THE JURY 1987: TECHNIQUES FOR THE TRIAL LAWYER 151, 154 (1987) (noting a 1977 survey that showed that although it is the practice of the New York state courts to permit attorneys to conduct the voir dire, 87% of the federal judges sitting in New York conduct their own voir dire without oral attorney participation).

34. *See* Treger, *supra* note 32, at 560-61 (noting that under the "adversarial view, the goal of voir dire is to impanel a jury with a favorable attitude toward the client's case, although the statutory purpose of voir dire is to select fair and impartial jurors."); *see also* Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 230 (1990) (noting that the search for methods to select a favorable jury have led to an enormous increase in the publishing of information to help litigators in the jury selection process); Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 722 (1991) (concluding "that attorney-conducted voir dire is not an effective procedure for selection of impartial juries."); Paul N. Luvera, *Truth or Consequences -- Is Voir Dire Really a Waste of Time?*, 43 WASH. ST. B. NEWS, May 1989, at 11 ("[E]xperienced trial advocates will admit there is abuse of the jury selection process by attorneys . . . [who are] guilty of taking improper advantage of the voir dire procedure."); Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS 3, 6 (1976) (noting that the goal of "Scientific Jury Selection" is to use social science research to help attorneys select jurors with favorable attitudes towards their client's case).

what goes on in jury selection rooms in New York State Supreme Court every day.[35]

If we must have juries sitting on civil cases, let us at least concede that juries are going to be biased and maybe ask them no questions, just bring them in and say to the first twelve, "You are the jury."[36] That is an anathema, I am sure, to a lot of practicing lawyers in this country. However, when you actually think about it, it is probably closer to the essential essence of what we were trying to achieve with the jury system in the first place. You might say that six people are not going to be representative of one's peers in a particular circumstance.[37] Let us put twenty on the jury or fifteen on the jury. By seating a larger number of jurors, maybe you can flatten out the effect of any biases.[38] Then you might say, "How do we get all these people to agree? We will never reach a verdict." I say that is fine. If they are going to decide the question on a preponderance of the evidence, let us say

35. In New York civil practice, the attorneys conduct the questioning of prospective jurors during the voir dire. The judge will only intervene if there is some unresolvable dispute between the parties. *See* SIEGEL, *supra* note 32.

36. *See* Hon. James D. Heiple, *Panel Two: Innovations for Improving Courtroom Communications and Views from Appellate Courts*, 68 IND. L.J. 1061, 1078 (1993) ("If we took the first twelve people out of the box . . . and swore the jurors in and went on with the trial, we might have a representative jury."); *see, e.g.*, Eric Wertheim, Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 988 n.44 (1986) ("[S]ome attorneys accept the first 12 prospective jurors without examination . . . ." (citing V. HALE STARR & MARK MCCORMICK, JURY SELECTION 75, 223 (1985))).

37. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 716 (1971) (concluding that surveys compiled demonstrate that the smaller the jury, the less the chances are of compiling a jury which truly represents "all community views").

38. Edward P. Schwartz & Warren F. Schwartz, *Decision Making by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775, 807 (1991) (concluding that "if we are concerned with jury verdicts reflecting the preferences of the average member of society as closely as possible, larger juries are certain to achieve this result better than smaller juries."); Zeisel, *supra* note 37, at 716 (stating that larger juries better represent "all community views").

the decision can be made by a preponderance of the jurors.[39] Maybe only seventy-five percent need agree on a verdict.

Other problems with the jury system relate to the ability of juries simply to understand what is being said to them.[40] Last night, I was in the city at a meeting of a products liability committee that I sit on. On our committee we have a number of prominent lawyers, including a judge of the New York Supreme Court who has recently retired. He had been on the bench for twenty years. He concedes that in complex cases, juries often reach decisions which have little or nothing to do with the facts, and have nothing to do with the law. They often reach decisions, in my view, on their impression of the lawyer and whether they trust him or not. I think the opportunity that is given to lawyers to speak to jurors in jury selection rooms is abused.[41] It is like a

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39. *See generally* Schwartz & Schwartz, *supra* note 38 (advocating the supermajority approach to jury verdicts).

40. *See* Cecil et al., *supra* note 29, at 753 (noting a research study of the American jury system which revealed that some jurors were "'out of their league'" in understanding judicial instructions); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 731-32 (1981). Schwarzer states that:

> [I]ssues submitted to jurors are often technical and foreign to their experience . . . [making it] much more difficult for juries to return informed verdicts . . . [and that] [p]revailing practices of instructing juries are often so archaic and unrealistic that even in relatively simple cases what the jurors hear is little more than legal mumbo jumbo to them.

Id.; *see also* Elizabeth F. Loftus & Edithe Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 COLUM. L. REV. 1425, 1431-33 (1984) (reviewing REID HASTIE ET AL., INSIDE THE JURY (1983) (discussing juror confusion and the different types of errors that jurors make)).

41. *See* Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 522 (1965) ("[A]bout eighty per cent of the lawyers' *voir dire* time was spent indoctrinating, only twenty per cent in sifting out the favorable from the unfavorable veniremen.") (emphasis in original); Joseph F. Flynn, *Prejudicial Publicity in Criminal Trials: Bringing* Sheppard v. Maxwell *into the Nineties*, 27 NEW ENG. L. REV., 857, 872 (1993) ("[A]buses of voir dire are common, with the result being that the ultimate goal, an impartial jury, becomes less important than the skill of the respective attorneys to skew the bias their way."); Hastie, *supra* note 34, at 725 ("Extended attorney-conducted voir dire procedures are ineffective at winnowing out prejudiced

beauty show. It is the opportunity for the attorney to make these jurors his friend, and objectivity goes out the window.[42]

Turning now to the question of precision in the law, as a defense-minded lawyer, I said to you that surprises are not what I like. I come from a different tradition originally. I practiced law in South Africa for many years before I came to the United States.[43] Legislation in South Africa, forgetting the political content, is extremely precise and well-drafted. I am delighted to hear that Professors Twerski and Henderson are attempting to bring about precision in drafting of the law, here, as it applies to section 402A.

It is mind boggling to me, as a practicing attorney, and to many of my colleagues, that here in the United States we have hundreds of thousands of lawyers.[44] We have lawyers crawling all over Washington, and yet the laws that come out of our legislature are a complete mess. First, they are vague in and of themselves. Then they are passed on to a regulatory agency which proceeds to make them even more vague.[45] It is great for the le-

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jurors, subject to abuse by attorneys, lower public regard for the jury system, and are expensive.").

42. *See* Broeder, *supra* note 41, at 522 ("[T]he lawyers' image of *voir dire* -- not so much a place to screen out 'undesirables' as a place to argue, to prepare the jurors for particular items of evidence or rules of law, and to ingratiate themselves with the jurors.") (emphasis in original); Flynn, *supra* note 41, at 872 ("many attorneys attempt to use voir dire to educate and establish a rapport with the jurors . . .").

43. Mr. Crofton practiced law in South Africa for nine years.

44. As of 1991, there were approximately 744,000 lawyers employed in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 392 (112th ed. 1992).

45. *See generally* Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 295 (1993) (stating that the Community Reinvestment Act rating system is vague and imprecise as set out in the regulations enacted); David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423, 439 (1983) (noting that there is such little precision in the law that inconsistencies in language often exist within the same statute); E.F. Roberts, *Judicial Notice: An Essay Concerning Human Misunderstanding*, 61 WASH. L. REV. 1435, 1442 (1986) ("Any number of laws enacted by the Congress are so vague that the administrator of them must actually make basic decisions involving the strategy as to how whole programs should be implemented."); Richard B.

gal profession because we will fight about problems in the laws from here to the next century. It is very bad from a societal point of view.[46] I am, therefore, delighted to hear about the current effort towards precision. Precision will allow judges to make decisions where the facts are plainly not in dispute. Summary judgment standards from a procedural standpoint may be made less stringent than they are today. Currently, any whiff of a factual dispute avoids summary judgment, and bear in mind that a whiff of a factual dispute in products liability cases is often introduced by a paid expert. I have had cases where no one has argued about the basic facts of the case until we moved for summary judgment, when out of the woods comes a paid expert who raises an issue of fact and summary judgment is denied. That is the type of procedural problem that one is faced with in practice. Thank you very much.

Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1209 (1982) ("[C]ongress, in writing vague or general laws, relies on agency specialization to particularize and narrow statutory norms.").

46. *See* James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1181 (1993) ("Vague laws offend several important values: they deny people fair notice that certain conduct is forbidden, they inadequately define crimes prior to commission, and they permit 'arbitrary and discriminatory enforcement.'" (citing Smith v. Goguen, 415 U.S. 566, 572-73 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972))); Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 938 (1993) ("When Congress writes unnecessarily vague laws, it is not solving problems but creating them.").